

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

THE NEIGHBORHOOD HOUSE ASSOCIATION

and

Case 21-CA-35986

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 2028, AFL-CIO

Robert MacKay, of San Diego, California,
for the General Counsel.

Christopher W. Carlton and Dave Carothers, Esqs.,
of San Diego, California, for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at San Diego, California, on April 28, 2004, upon the General Counsel's complaint (amended at the hearing) which alleged principally that the Respondent unilaterally changed an established working condition of granting a cost of living increase (COLA) to employees by withholding implementation of an approved COLA and thus violated Section 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq.

The Respondent generally denied that it committed the unfair labor practices alleged, and affirmatively contends the COLA approved was a subject of negotiations and the parties have been unable to agree to the amount of the COLA.

Upon the entire record, including my observation of the witnesses, briefs¹ and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

I. Jurisdiction

At all material times, the Respondent has been a California 501(c)(3) non-profit corporation engaged in providing social welfare services with offices and facilities throughout San Diego County, California. In the course of its operations, the Respondent annually derives gross revenues in excess of \$250,000 and annually purchases and receives at its San Diego County locations, goods, products and materials valued in excess of \$50,000 from enterprises which had received such goods, products and materials directly from points outside the State of California. At all material times, the Respondent has been an employer engaged in interstate commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

Service Employees International Union, Local 2028, AFL-CIO (herein the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts.

The essential material facts here are not in dispute. The Respondent is engaged in providing a variety of social services in the San Diego area, including the Federally funded Head Start program. In providing these services the Respondent employs professionals, non-professionals and others.

On March 7, 2003,² the Union was certified as the exclusive bargaining representative in separate units of Head Start employees – one of professionals and the other of non-professionals. The parties began negotiations for a collective bargaining agreement in early summer and to the date of the hearing here have had numerous bargaining sessions but have not reached an agreement.

¹ Counsel for the General Counsel filed a Motion to Strike Post-Hearing Brief of Respondent, on grounds that the Respondent's brief was hand delivered to my office on the brief due date but Counsel for the General Counsel was not notified of this by telephone as, he asserts, is required by Section 102.114 of the Board Rules and Regulations. While there may have been technical non-compliance on the part of Counsel for the Respondent, I cannot conceive how such would in any way prejudice the General Counsel. Counsel for the General Counsel contends that his brief was mailed on June 1, 2004, and "General Counsel's timely filed brief was in Respondent's possession before Respondent filed its brief." This is pure speculation and is probably not accurate. The General Counsel's brief would certainly not have been delivered to the Respondent's San Diego office before June 2, yet the Respondent's brief is date stamped in my San Francisco office on June 2. Indeed, Counsel for the General Counsel's brief is date stamped June 3, though he asserts he mailed it to me and to Counsel for the Respondent on June 1. I overrule the General Counsel's motion and have considered the briefs of both counsel.

²All dates are in 2003, unless otherwise indicated.

Every three years, the Respondent applies for and has received a Federally funded grant to operate the Head Start program. Each year the Federal grant includes a cost of living (COLA) increase. The Respondent determines how this COLA will be allocated, but must apply for permission to use it such manner. Upon receiving permission, the Respondent then grants a COLA to its Head Start employees. For the past five years, the COLA increases have been: 2002-03, 3.5%; 2001-02, 3.5%; 2000-01, 3.6%; 1999-00, 2.2%; and, 1998-99, 3.1%.

For fiscal year 2003-04, the Federal grant was for a COLA of 1.5%; however, the Respondent determined to use it all for wages which would amount to a 2.2% COLA for each employee. The Respondent submitted its proposed COLA in the Spring received approval in the Fall to allocate the COLA at 2.2% for employee wages, retroactive to July 1 – the actual implementation to be accomplished by the December holidays.

Mary Grillo is the Executive Director for the Union, and the Union's chief negotiator. She testified that in September she had a telephone conversation with Regina Evans, the Respondent's Executive Vice President and Chief Operating Officer, during which Evans said that the Respondent "was going to proceed to implement the COLA. And I informed her that now that the Union has been recognized they have to discuss any changes to wages, benefits and working conditions." And: "So she asked me if I didn't want the COLA implemented and I stated that, of course, we never stand in the way of increasing workers' wages but that she is obligated to discuss these matters with the Union."

Evans denied that she and Grillo discussed the proposed COLA in September (though agreeing they had a phone conversation then); however, she testified that in May or June they had a phone conversation during which "I also informed Ms. Grillo that we had an approved cost of living adjustment from the Federal government" Since the proposed 2.2% was not approved by the Federal administrators until Fall, I conclude that the discussion wherein Evans said the Respondent intended to implement it must have taken place in September. That it had not been implemented was discussed at the October 4 session. Perhaps in May or June, Evans had informed Grillo that the Respondent had applied for approval of 2.2%. And in the Union's first contract proposal, presented in June, a COLA of 3% was proposed, which the Union acknowledges was the 2.2 plus .8%, in addition to a 7.5% wage increase. In its initial proposal, submitted in June or July, the Respondent offered a 2.2% COLA plus a 2.5% wage step increase.

There followed bargaining sessions, particularly one on October 14, wherein the Union asked that the 2.2% be granted and the remaining .8% be left to negotiations. But for Grillo's initial statement to Evans that the Respondent could not implement the COLA absent bargaining, the Union has taken the position that the Respondent should implement the 2.2% and the parties would continue to bargain over the remaining .8% (as well as other items). The Respondent has repeatedly argued that it would only implement the 2.2% if the Union would agree that such would end discussion of the COLA. These respective positions are memorialized in a series of letters between the Respondent and the Union, the relevant portions of which:

December 10, Evans to Grillo:

At this point, we believe that it would be unfair to our employees if we did not implement the COLA before the end of December. To prevent this inequity, we need to implement the COLA for all eligible Head Start employees in time to include all retroactive pay (for the period July 1, 2003, to present) in the paychecks that will be distributed on December 18, 2003. Accordingly,

regardless of whether it is obligated to do so, NHA is requesting SEIU Local 2028 to bring closure to this issue by consenting to the immediate implementation of the 2.2% COLA for the bargaining unit employees. If SEIU Local 2028 is unwilling to consent to implementation of the budgeted COLA for bargaining unit employees, NHA will have no choice but to implement the COLA for non-bargaining unit employees only.

December 12, Grillo to Evans:

SEIU Local 2028 has no objection to your immediate implementation of the 2.2% COLA retroactive to July 1, 2003 for bargaining unit employees. * * * SEIU Local wants to make it clear that by consenting to the immediate implementation of the COLA that it is not agreeing that the issue of wages is closed. Nor is the issue of future COLA payments closed. SEIU Local 2028 intends to continue negotiations on these issues and we specifically reserve the right to do so.

December 16, Evans to Grillo:

(Referring to Grillo's December 12 letter) you indicated that SEIU Local 2028 would consent to NHA's implementation of its budgeted COLA of 2.2% but only if the Union could continue to negotiate for a larger COLA. This is not an acceptable or fair bargaining tactic. The Agency is not willing to implement a COLA unless and until the parties have reached a complete and final agreement on this issue. As a result, NHA will not be implementing the budgeted COLA for the bargaining unit at this time.

Memo December 18, Evans to employees:

I must point out that the agency had also hoped to implement the 2.2% COLA for eligible team members in the bargaining units represented by SEIU Local 2028, but the Union has not yet agreed to accept this COLA. Instead, SEIU Local 2028 is demanding a 3.0% COLA. In fact, the agency offered to implement the 2.2% COLA for the bargaining units employees if the Union would agree to drop its demand for a 3.0% COLA, but the Union would not agree to do so. We continue to negotiate in good faith with SEIU Local 2028 about the 2003-2004 COLA (as well as the other terms for a labor contract), and we will do our best to promptly implement whatever COLA is finally negotiated with the Union for the bargaining units.

B. Analysis and Concluding Findings.

Although there are some minor disputes about what was said concerning the 2003-2004 COLA and when, they are irrelevant to the material issues here. There is no doubt that implementing a COLA had become an established practice upon the Federal administrator of the Hear Start program designating a COLA for the fiscal year. While the amount of the COLA is discretionary and must be approved before implementation, the fact of a COLA is, and has been, a fixed working condition.

On facts similar to those here, the Board recently said:

In adopting the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally withholding the 2000 annual wage adjustment, we also adopt his

finding that the wage adjustment had become an established pattern and practice over many years, and therefore constituted a condition of employment that the Respondent was not free to change unilaterally. *Lee's Summit Hospital and Health Midwest*, 338 NLRB No. 116, n3 (2003).

Similarly, in *Hydrotherm, Inc.*, 302 NLRB 990 (1991), the Board found a violation of 8(a)(5) when the company refused to implement its past practice of granting annual merit wage increases unless the union agreed not to pursue negotiations for a general wage increase. The Board noted that the company was free to propose that wages would be limited to the scheduled merit increases, or even propose less. "It was not acting in good faith, however, when it stated that the scheduled wage increases would be granted only if the [u]nion agreed to put forward no counter-proposal whatsoever."

Such is precisely the situation here. The Respondent repeatedly told the Union that the price of implementing the approved COLA of 2.2% was foregoing any further negotiations of a COLA. In short, the Respondent withheld an established benefit as a bargaining tactic. By this act it violated Section 8(a)(5) notwithstanding that the matter of implementing the COLA had been discussed in negotiation sessions. The Respondent certainly could have implemented the 2.2% COLA without agreeing to the Union's proposal for an additional .8% or indeed any other of the Union's proposals.

The Respondent relies on *Stone Container Corporation*, 313 NLRB 336 (1993) and *Alltel Kentucky Inc.*, 326 NLRB 1350 (1998) in arguing that refusing to implement the COLA in these circumstances was not violative of the Act. In *Stone Container*, the company informed the union that it would not be granting a wage increase (which it had for several years) due to economic reasons. However, the company did not refuse to bargain about this refusal. And in *Alltel Kentucky*, there was no violation of Act when during negotiations for an initial contract the employer told the union of its intent to discontinue the past practice of granting cost of living increases.

In these, and similar cases, the company announced its intent to discontinue a past practice, and gave the union an opportunity to negotiate. Thus the ultimate discontinuance was not unilateral and violative of the Act. Here, on the other hand, the Respondent did not suggest that it was intending to cease implementing a COLA for 2003-2004, or subsequent years. It was simply delaying implementation of the COLA until it received a favorable response from the Union concerning negotiations. The Respondent did not propose, nor was there discussion about, eliminating a past practice, as in *Stone Container* and *Alltel Kentucky*. The practice of granting a COLA approved by the Head Start administrator remained. Actually implementing it was contingent on the Union agreeing not to pursue any additional amount. Thus when the Respondent refused to implement the COLA by December, as had been the practice, it unilaterally changed a condition of employment.

On these facts I conclude that in December the Respondent unilaterally withheld implementation of the 2.2% COLA for employees in both bargaining units and conditioned implementation of the COLA on the Union waiving its right to negotiate an addition to the COLA, all in violation of Section 8(a)(5) of the Act.

IV. Remedy

Having concluded that the Respondent committed certain unfair labor practices, I shall recommend it cease and desist therefrom and take certain affirmative action necessary to

effectuate the policies of the Act, including granting to each employee in the bargaining units backpay in the amount of 2.2% of their respective annual wage retroactive to July 1, 2003, with interest. Any employee terminated for any reason after July 1, 2003, will also be entitled to receive the COLA.

It appears, and I conclude, that the COLA issue has affected the overall ability of the Union to negotiate a collective bargaining agreement in a timely fashion. Notwithstanding that the parties have had numerous bargaining sessions, I conclude that it is necessary to extend the certification year in order to give the Union a fair chance to negotiate a collective bargaining agreement. *Mar Jac Poultry*, 136 NLRB 785 (1962).

On the foregoing findings of fact and conclusions of law, and the entire record in this matter, I hereby issue the following recommend:

ORDER³

The Respondent, The Neighborhood House Association, its officers agents, successors and assigns, shall:

1. Cease and desist from:

- a. Refusing to bargain collectively and in good faith with the Union concerning wages, hours and others terms and conditions of employment.
- b. Withholding implementation of the regularly scheduled COLA for bargaining unit employees.
- c. Conditioning implementation of the regularly scheduled COLA upon the Union waiving its right to bargain about additional COLAs.
- d. In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

- a. Upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of all employees in the below described bargaining units concerning wages, hours and other terms and conditions of employment and if an agreement is reached, embody that agreement in a signed contract, the Union certification to be extended one year from the date the Respondent complies with this Order:

Unit A:

³If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All full-time and regular part-time nonprofessional Head Start employees, including associate teachers, cooks, food service workers, drivers, bus drivers, bus monitors, office assistants, custodians, teachers' aides, family services specialists, family services assistants, employed by the Respondent at all of its facilities and operation located in San Diego County, California; but excluding all other employees, professional employees, casual employees, family resource technicians, all employees located at 5660 Copley Drive, San Diego, California, team leader pay custodians, management analysts, administrative assistants, confidential employees, managerial employees, guards and supervisors as defined in the Act.

Unit B:

All full-time and regular part-time professional Head Start employees, including home visitors, family services advisors, Head Start Program advisors, Head Start Program specialists, master teachers, teachers and mentor teachers employed by the Respondent at all of its facilities and operations located at San Diego County, California; but excluding all other employees, non-professional employees, casual employees, management analysts, administrative assistants, family resource technicians, all employees located at 5660 Copley Drive, San Diego, California, confidential employees, managerial employees, guards and supervisors as defined in the Act.

- b. Implement a 2.2% COLA, retroactive to July 1, 2003, with interest, for all employees in units A and B, including those who have been terminated since July 1, 2003, to the date the Respondent complies with this Order.
- c. Within 14 days after service by the Region, post at its each of its facilities copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees of the Respondent at any time since July 1, 2003.
- d. Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment

⁴If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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- e. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

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Dated, San Francisco, California, June 15, 2004.

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James L. Rose
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

Federal Law gives you the right to:

Form, join or assist a union
Choose representatives to bargain on your behalf
To act together with other employees for your benefit and protection
Choose not to engage in any such protected activity.

WE WILL NOT refuse to bargain collectively and in good faith with the Union concerning wages, hours and others terms and conditions of employment for employee in the bargaining units covering professional and non-professional employees of the Head Start program.

WE WILL NOT withhold implementation of the regularly scheduled COLA for bargaining unit employees.

WE WILL NOT condition implementation of the regularly scheduled COLA upon the Union waiving its right to bargain about additional COLAs.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL implement a 2.2% COLA, retroactive to July 1, 2003, for all professional and non-professional employees of the Head Start program, with interest, including those who have been terminated since July 1, 2003.

THE NEIGHBORHOOD HOUSE ASSOCIATION

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Resident Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

555 West Beech Street – Room 418
San Diego, CA 92101-2939
(619) 557-6184, Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3005.